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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 995

ROSS HOWARD, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1089

BENJAMIN LEVINSON and FRANKLIN MORTGAGE CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. in No. 995 App. A; Pet. No. 1089 App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 1968. The petition for a writ of certiorari in No. 995 was filed on January 29, 1969. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari in No. 1089 to February 28, 1969, and on February 26, 1969, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In No. 995:

1. Whether the conspiracy count failed adequately to charge the offense of conspiring to defraud the United States.

2. Whether the conspiracy statute in defining an illegal conspiracy as one whose objective is either to commit an offense against the United States or to defraud the United States was intended to create two mutually exclusive crimes.

3. Whether the conspiracy to defraud the United States clause of 18 U.S.C. 371 is unconstitutionally vague.

In No. 1089:

4. Whether the admission into evidence of a statement of one of petitioners' codefendants, which allegedly implicated petitioners Levinson and Franklin, required reversal despite the fact that the record is replete with similar and corrobative evidence of every fact contained in the statement.

5. Whether the trial judge erred in refusing to explain and interpret in his charge all the various regulations of the Veterans Administration concerning the home loan guaranty program.

STATEMENT

After a trial by jury in the United States District Court for the Eastern District of Michigan, petitioners were convicted of violating 18 U.S.C. 371 by conspiring to violate 18 U.S.C. 1001 and to defraud the Veterans Administration, by preventing it from having its loan guaranty program administered in accordance with the provisions of 38 U.S.C. 1801 *et seq.* and the rules and regulations promulgated thereunder and of related substantive offenses. The substantive violations charged in counts 2 through 25 of the indictment arose out of the conspiracy and charged either petitioners or their codefendants with specific violations of 18 U.S.C. 1001 by submitting documents containing false and fraudulent statements to the Veterans Administration.[1] On June 19, 1967, petitioners Levinson and Howard were sentenced to pay fines of $10,000 each and to imprisonment for eighteen months under the provisions of 18 U.S.C. 4208 (a)(2), and petitioner Franklin Mortgage Corporation was fined $10,000.

Petitioners do not challenge the sufficiency of the evidence to support their convictions. A detailed statement of the facts concerning the complicated trans-

[1] Petitioners were each convicted on every count in which they were charged.

actions underlying their convictions is contained in the opinion of the court of appeals (see Pet. in No. 1089 App. A. 45-52). Thus, we merely outline here the highlights of the scheme proved at trial and those additional facts necessary for a resolution of the issues raised by petitioners in this Court.

1. The Veterans Administration's home loan program is based upon 38 U.S.C. 1801 *et seq.* which provides for the issuance by the VA of guaranties on mortgage loans made to veterans. Loans may be guaranteed on either the "automatic basis" or the "prior approval basis." Automatic guaranties are made on loans by "supervised lenders"—*i.e.*, any financial institution, insurance or mortgage and loan company that is subject to "examination and supervision" of an agency of the federal or a state government. Where automatic guaranties are involved the supervised lender is responsible for determining whether the loan meets the requirements of the statute and regulations. "Non-supervised lenders"—*i.e.* those not subject to the supervision of a federal or state agency—must seek guaranties on the "prior approval basis." Under this system, the VA, not the lender, makes the final determination as to whether or not the loan comports with all statutory and regulatory requirements. The VA would make this determination on the basis of the information which must be submitted to it by the lender. If the loan is held to qualify, the VA so notifies the lender who then closes the loan and submits the loan to the VA which issues its guaranty (336a).[2]

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[2] Record references are to the Joint Appendix filed in the court of appeals and to the Government's appendix to its brief

Petitioner Franklin Mortgage Corporation was a non-supervised lender and petitioner Levinson was its president and major stockholder (341a). Petitioner Howard began working for Franklin with the title of Executive Assistant in September, 1962 (577a).

Franklin, as a non-supervised lender, was only able to secure VA guaranties on the prior approval basis. During the latter part of 1962, it was having difficulty in getting guaranties on some of its loan applications; 21 of its 46 loan submissions were rejected by the VA because the applicants were poor credit risks (449a). Thereafter, Franklin entered into accommodation arrangements with several supervised lenders who could automatically secure VA guaranties. Under these arrangements, Franklin would process loan applications and submit them to a supervised lender which would make an independent determination as to whether the veteran was a satisfactory credit risk. After approving the loan, the supervised lender would close the loan and apply for an automatic guaranty from the VA. After the guaranty was received, the supervised lender would assign the mortgage back to Franklin (574a-576a, 1380a). Such accommodation arrangements were not illegal at the time so long as the supervised lender made an independent check of the veteran's credit and qualifications.

After the supervised lenders rejected some of the loans submitted to them by Franklin and several of

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in the court of appeals ("G.A.") copies of which we are lodging with the Clerk of this Court.

these lenders indicated that they would not renew the arrangements when their terms expired (1354a-1355a, 1562a-1563a), Levinson directed Howard to seek supervised lenders who would be interested in entering into accommodation arrangements (1566a-1567a, 1265a). In December, 1962, Howard contacted Edward P. Strang president of Wayne National Life Insurance Company, a supervised lender, and explained to him that Wayne could process V.A. mortgages on an automatic guaranty basis. Subsequently Levinson and Strang met and entered into a written contract dated December 20, 1962, under which Franklin would originate and process approximately $200,000 worth of loans to be made by Wayne which would submit them to the VA for automatic guaranties. After receiving the guaranties the loans would be assigned by Franklin to Wayne (1289a-1292a; 1947a-1949a). Wayne was to receive a fee of 2% on each loan thus processed. Robert Cerwin, a vice-president of Franklin, testified that it was agreed between Wayne and Franklin that Wayne would obtain the VA guaranties but Franklin would attend to all the details including the credit check (581a-583a).

Levinson thereafter contacted Rem Realty, a small real estate corporation dealing mostly with inner city properties and poor credit risks, which had in the past falsified credit information (1059a-1062a). He told its owners that he had a new source who could secure VA guaranties on an automatic basis (870a-873a), and would accept anything regardless of the credit risks involved. Rem Realty thereafter brought to Franklin's office approximately 12 to 15 applications

which were characterized by its sales manager as "garbage"—*i.e.*, exceptionally poor credit risks (869a-875a, 589a-591a). An officer of Franklin, after examining some of these files and noting that some of the loans had been previously rejected, warned Levinson that Franklin was looking for trouble if these loan applications were submitted to the VA for automatic approval. Levinson, however, ordered that the applications be processed (595a-597a).

The papers in connection with the submission of 22 loans (including these 15 from Rem) were prepared at Franklin. These papers contained false information concerning the credit of the veterans and in a number of instances the signature of the veteran borrower was forged (826a-827a, 1059a-1061a). No submission was made to Wayne for an independent credit check. After the loans were already closed, Strang went "through the motions" of approving the loans for Wayne (600a). Late in January and in early February 1963, the loan packages were sent to the VA for its guaranties. Although Franklin actually made the submissions the covering letter was on Wayne stationary (346a, 1014a, 1913a).

2. An F.B.I. agent testified at trial, over objection by petitioners Levinson and Franklin, concerning an unsigned statement given by codefendant Strang to the F.B.I. after the termination of the conspiracy (1188a-1204a). In this interview Strang stated, *inter alia*, that Levinson and the Franklin Corporation, not Wayne, were responsible for checking the credit risk of the loans submitted to the VA (1188a-1204a).

Strang himself did not testify at the trial.[3] During cross examination by counsel for Strang the entire unsigned written statement was admitted into evidence over objections by petitioners' counsel (1233a-1246a).

ARGUMENT

Petitioner Howard (No. 995) makes a three pronged attack on the conspiracy count contained in the indictment. He contends that it insufficiently charged the offense of conspiring to defraud the United States; that the "either"—"or" structure of the statute[4] bars the charging of both a conspiracy to commit offenses against the United States and a conspiracy to defraud the United States arising out of the same conduct; and finally that if the conspiracy count is held to be sufficient to charge the offense of conspiracy to defraud the United States then the conspiracy statute is void for vagueness.

1. A valid indictment must apprise the accused of the nature of the charges with enough specificity so that he can prepare a defense and it must be framed so that it can serve as an adequate basis for a plea of double jeopardy if subsequent charges involving the same conduct are brought against the accused. *United States* v. *Debrow*, 346 U.S. 374, 376, 378. The conspiracy count in this case met these requirements.

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[3] Strang was also convicted at the trial and on appeal his conviction was affirmed by the court of appeals. He has not filed a petition for certiorari in this Court.

[4] 18 U.S.C. 371 makes it a crime for "two or more persons [to] conspire either to commit any offense against the United States, or to defraud the United States * * *."

Paragraph 3 of Count I dealing with the defrauding aspect of the charge alleged (9a):

> (3) It was a part of said conspiracy that the defendants would represent that Wayne National Life Insurance Company processed loans to veterans (authorized pursuant to section 1802(d), Title 38 United States Code) and submitted these loans to the Veterans Administration for automatic guaranty, when in fact the aforesaid loans were, as intended by the defendants, processed by the Franklin Mortgage Corporation (not authorized pursuant to Section 1802(d) Title 38, United States Code to take such action) as the intended mortgagee.

Paragraph (4) enumerated those applications and loan documents containing the false statements made to the V.A. in furtherance of the conspiracy (9-10a).

The indictment thus charged a conspiracy to defraud the United States by circumventing the credit checking procedures of a statutory scheme designed to assist veterans in the purchase of homes, and by the submission of documents containing false and fraudulent statements. It thus charged a fraud on the United States. See *Dennis* v. *United States*, 384 U.S. 855; *United States* v. *Johnson*, 383 U.S. 169, 172; *United States* v. *Keitel*, 211 U.S. 370.

2. The contention that the conspiracy count was defective because it alleged violations of both aspects of 18 U.S.C. 371 is insubstantial. The same conduct may constitute a conspiracy both to defraud the United States and to commit offenses against the United States. It is proper to refer to both objectives in a single count of an indictment since it is only a

single offense which has been committed, and only a single sentence may be imposed. *United States* v. *Manton*, 107 F. 2d 834, 838 (C.A. 2), certiorari denied, 309 U.S. 664; Cf. *Dennis* v. *United States*, 384 U.S. 855, 859-864; *Glasser* v. *United States*, 315 U.S. 60, 66-67.

3. Nor can it be said that to construe the conspiracy statute so that it applies to reach the conspiracy shown here renders the statute void for vagueness. Just as the generic term fraud has a well understood meaning, so the terms used in this statute "to defraud the United States * * * in any manner or for any purposes" likewise have a well recognized meaning. See *Hammerschmidt* v. *United States*, 265 U.S. 182, 188; *United States* v. *Keitel*, 211 U.S. 370; *Hyde* v. *Shine*, 199 U.S. 62, 78-83.

4. The trial here was completed in July 1966, almost two years before this Court decided *Bruton* v. *United States*, 391 U.S. 123. Relying upon *Roberts* v. *Russell*, 392 U.S. 293, petitioners Levinson and Franklin contend (Pet. No. 1089, pp. 13-21) that the principles enunciated in *Bruton* require reversal of their convictions. The gist of their complaint is that the admission of the statement of co-defendant Strang, who did not take the stand, prejudiced them because it contained assertions that Levinson agreed that Franklin would assume the full responsibility for checking the credit risk on the loans to be submitted to the VA by Wayne (Pet. 8-10).

It should first be noted that the Strang statement is not a confession and does not directly implicate Levinson. Moreover, as the court of appeals pointed out

the case presented by the government at this twelve week trial "is replete with other evidence and testimony to the same effect" (Pet. No. 1089, App. A 59). Thus, Robert Cerwin an officer of Franklin, who was closely involved in the arrangements between Franklin and Wayne, testified that at a meeting between Levinson, Strang and himself it was agreed that Franklin would bear the responsibility of checking credit (581a-583a). In addition, a secretary testified that Franklin closed loans without first submitting the papers to Wayne (820a-824a). Moreover, the detailed testimony concerning the willingness of Levinson and Franklin to accept and process the loan applications described as "garbage" shows that it was never their intention that Wayne—or for that matter anyone else —would check the credit risks involved to see if they satisfied VA requirements. In short, this case is completely unlike either *Bruton* or *Roberts*, where the "powerfully incriminating" confession of one defendant implicating another was "deliberately spread before the jury in a joint trial" (391 U.S. at 135-136). The government proved its case against petitioners Levinson and Franklin from the direct testimony of its witnesses and its documentary exhibits, not from a co-defendant's statement. Considering further that insulating instructions were given to the jury,[5] the court of appeals correctly decided in the circumstances

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[5] As this Court pointed out in *Bruton* (391 U.S. at 135) "Not every admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently."

of this case that the admission of this evidence did not constitute reversible error. *Chapman* v. *California*, 386 U.S. 18; Cf. *Lutwak* v. *United States*, 344 U.S. 604, 619-620.

There is no conflict concerning the impact of *Bruton* between the decision of the court below and the Third Circuit's decision in *United States ex rel. Johnson* v. *Yeager*, 399 F.2d 508 (C.A. 3). In that case the court rejected the argument that the admission of the confessions of two co-defendants, each implicating the confessor and his co-defendant was harmless error. However, the Court rested its decision on the fact that the two confessions differed as to the relative role each defendant played in the murder and that this may have affected the jury's determination that the death penalty should be imposed on both defendants. Indeed, in another recent case the third circuit applied a harmless error rule in considering an alleged violation of the principles of *Bruton*. *United States* v. *Muller*, C.A. 3, No. 17,075, decided on October 10, 1968, petition for a writ of certiorari pending, No. 1244 Misc., this Term.

5. Petitioners Levinson and Franklin contend (Pet. No. 1089 pp. 25-29) that the trial judge committed reversible error in refusing in his instructions to read, explain and interpret the regulations of the VA concerning the home loan guaranty program. As the court of appeals noted, however, the pertinent regulations were read to the jury numerous times during the trial, and defense counsel referred to them extensively during closing arguments (G.A. 7-13). An official of the VA was on the stand for nine days and was

examined in great detail on the meaning of the regulations (433a-437a, 480a, 496a, 493a, 485a, 476a, 466a-467a, 503a-507a, G.A. 2-3). The Lenders Manual published by the VA was introduced into evidence and was available to the jury during its deliberations. The trial judge referred to some of the regulations in his charge and carefully instructed the jury as to all the elements necessary to prove violation of 18 U.S.C. 371 and 1001 (1761a-1766a).[6]

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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MARCH 1969.

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[6] Reliance on *United States* v. *Pincourt*, 159 F.2d 917 (C.A. 3) is misplaced because there the trial judge did not even mention the pertinent regulation violation of which was the essence of the crime.

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